

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-21223

IN THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CALVIN RONALD DeVYVER,
Petitioner-Appellant

v.

UNITED STATES OF AMERICA,
Respondent-Appellee

COURT OF APPEALS CIVIL DOCKET No. 77-2122

APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT
CIVIL DOCKET No. 75-181

APPENDIX TO THE BRIEFS



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PAGINATION AS IN ORIGINAL COPY

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UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

UNITED STATES OF AMERICA

vs.

CALVIN RONALD DeVyver

Criminal Action #6850

CHANGE OF PLEA, before the Honorable JAMES S. HOLDEN,
Chief U.S. District Judge, For The District of Vermont,
at Rutland, Vermont, March 15, 1976.

APPEARANCES:

The Honorable JOHN HUGHES
Assistant U.S. Attorney

ROBERT E. WEST, Esquire
Attorney for the Defendant

1 (9:45) THE CLERK: The case before us at this time
2 is Criminal #6850, United States of America versus Calvin
3 Ronald DeVyver. Attorney for the Government is John Hughes Jr.
4 Attorney for the Defendant is Robert E. West. Defendant,
5 DeVyver is present in court with his attorney for a change of
6 plea.

7 THE COURT: Has the Defendant prepared a
8 petition requesting to enter a plea of guilty?

9 MR. WEST: Yes, Your Honor.

10 (Handed to the Court)

11 THE COURT: This case #6850, apparently has
12 an unusual history, Mr. Hughes, what's the situation at the
13 present time?

14 MR. HUGHES: Your Honor, at the present
15 time before the Court on five counts, Mr. DeVyver entered a
16 plea of guilty to Count I of the indictment I believe in
17 1973, a few months ago that plea was vacated and Counts II
18 through Count V were reinstated. At this time we have five
19 count indictments before the Court which I believe Mr. DeVyver
20 is here today to plead guilty to Count I.

21 THE COURT: I didn't,-- was there,-- did
22 Judge Coffrin enter an original order vacating the former
23 plea of guilty? I don't see one in the file and I

24 MR. HUGHES: I don't believe it was written,
25 Your Honor, I believe it was on a record which I have copies
26 of, I don't believe an actual order was ever written .

27 THE COURT: Well

1 MR. HUGHES: A motion

2 THE COURT: Yes.

3 MR. HUGHES: to vacate was before Judge
4 Coffrin.

5 THE COURT: Yes I see that, I have the
6 documents before me. Very well, Mr. DeVyver, is that the way
7 you pronounce your name?

8 MR. DeVyver: Yes, Your Honor.

9 THE COURT: The Court has before it your
10 written request to enter a plea of guilty to Count I of the
11 indictment which apparently you were arraigned on, -- re-
12 arraigned on this indictment before Judge Coffrin on February
13 3rd, is that correct?

14 MR. DeVyver: Yes, Your Honor.

15 THE COURT: And you now wish to change the
16 plea of not guilty to Count I that was entered at that time?

17 MR. DeVyver: Yes, Your Honor.

18 THE COURT: I understand your present age is
19 40?

20 MR. DeVyver: Yes, sir.

21 THE COURT: And Mr. West is assigned to
22 represent you in this case?

23 MR. DeVyver: Yes, sir.

24 THE COURT: Are you satisfied to have
25 Mr. West appear for you in these proceedings?

26 MR. DeVyver: Yes, sir.

27 THE COURT: Are you currently or have you

1 been under the care of a physician or a psychiatrist?

2 MR. DeVyver: No, sir.

3 THE COURT: And have you ever been hospital-
4 ized or treated for narcotic addiction?

5 MR. DeVyver: No, sir.

6 THE COURT: Do you wish to have the indict-
7 ment read?

8 MR. DeVyver: No, sir.

9 THE COURT: What is your plea to Count I of
10 the indictment?

11 MR. DeVyver: Guilty.

12 THE COURT: I am sure because of your, be-
13 cause of the background in this case, Mr. DeVyver, that you
14 understand your rights in this regard, however the Court feels
15 that the record should indicate that you do fully understand
16 your rights and I am sure you also know that the Court need
17 not accept your plea unless I am satisfied that you are
18 guilty and that you do fully understand your rights.

19 MR. DeVyver: Yes, Your Honor.

20 THE COURT: If the plea of not guilty were
21 to, should remain or if the Court should deny you permission
22 to withdraw that plea, of course you would be entitled to a
23 speedy, public trial by a Judge or jury and at such a trial
24 the Government would have to confront you with the witnesses
25 upon whom it relies to obtain conviction and you would have
26 the right to cross-examine those witnesses with the aid of
27 your assigned counsel. At such a trial you would be presumed

1 innocent until such time if ever the Government established
2 your guilt by competent evidence to the satisfaction of the
3 Judge or jury beyond a reasonable doubt, and at such a trial
4 you would be entitled to have process issued from this court
5 to compel the attendance of witnesses to testify in your be-
6 half if they had anything material to offer.

7 Count I of the indictment, Mr. DeVyver,
8 charges that you, also known as, were also known and referred
9 to in the indictment as Michael Itkin, Reverend Ronald Phillips
10 and Reverend Brian Phillips, charges on the 24th day of
11 August, 1972, at Brattleboro, in the District of Vermont, in
12 connection with the acquisition of four boxes of hand-gun
13 ammunition from a licensed dealer by the name of Sam's Depart-
14 ment Store, Incorporated, you did knowingly furnish and exhibit
15 a false, fictitious and misrepresented identification, namely
16 that a Vermont resident fishing license to the dealer, which
17 identification was likely to deceive the dealer with respect
18 to a fact material to the legality of the sale in that you
19 represented, you were Reverend Brian Phillips, Route I,
20 Burlington, where in actual fact you were Calvin Ronald
21 DeVyver and well knew you were not Brian Phillips and this
22 was in violation of Sections 922-A6 and 924-A
23 of Title 18 of The United States Code.

24 MR. WEST: If it please the Court, with regard
25 to the first count of the indictment as just reviewed by the
26 Court, we are not contesting the fact that Mr. DeVyver used a
27 resident, Vermont fishing license, knowing that he was not a

1 resident of the State of Vermont. However, earlier proceedings
2 in this case will verify that it has always been our position
3 that Mr. DeVyver is properly known, was properly known in 1972
4 as the Reverend Brian R. Phillips, that being a clerical name
5 which he was properly using at the time and this was not
6 disputed by the Government at earlier proceedings in this
7 case. It is a matter of the name being a correct clerical
8 name, we do not however dispute in any manner that this was
9 a resident license when Mr. DeVyver was not a resident of the
10 State of Vermont.

11 THE COURT: Mr. Hughes.

12 MR. HUGHES: That's correct, Your Honor, Mr.
13 DeVyver has used this name before, although it isn't an
14 officially changed name. The essence of this is the residence,
15 we believe that fully.

16 THE COURT: And use of the resident fishing
17 license.

18 MR. HUGHES: That's right, Your Honor.

19 THE COURT: Well of course, Mr. DeVyver, the
20 Government, if the case went to trial, would have to be
21 called upon to prove that on the day in question that you did
22 knowingly furnish a false, fictitious and misrepresented
23 identification which was a Vermont resident fishing license
24 to the dealer in firearms and ammunition, known as Sam's
25 Department Store, Incorporated in Brattleboro.

26 Now an act is done knowingly if it's done
27 voluntarily and intentionally, not because of any mistake or

1 accident or other innocent purpose. So the Government would
2 have to show that, established by competent evidence to the
3 satisfaction of the Judge or jury that you did knowingly
4 exhibit a false and fictitious resident hunting license and
5 that that was a, likely to deceive the dealer and apparently
6 the effect would have that capability, do you understand that?

7 MR. DeVyver: Yes, sir.

8 THE COURT: And of course that would involve,
9 that you did so intentionally and with intent to deceive the
10 resident, dealer in firearms, a licensed dealer, do you
11 understand that?

12 MR. DeVyver: Yes, sir.

13 THE COURT: What do you understand the
14 penalty that can be imposed if the Court should accept your
15 plea in this case?

16 MR. WEST: If it please the Court, the
17 maximum penalty for the violation provided in the United
18 States Code is a maximum of five years imprisonment, however
19 as a result of the fact that there was an earlier sentence in
20 this case it is our understanding that no more than the
21 maximum of that sentence could now be imposed which was three
22 and one-half years.

23 THE COURT: Well what's the Government's
24 position on that, Mr. Hughes?

25 MR. HUGHES: I believe that that's the case
26 however I'm,--

27 THE COURT: Well I'm not familiar with the

1 past proceedings or what has occurred in this instance; the
2 maximum penalty prescribed by law is five years or five
3 thousand dollars fine or both, do you understand that?

4 MR. DeVyver: Yes, sir.

5 THE COURT: What is the evidence that the
6 Government would establish if this case were to come to trial,
7 Mr. Hughes?

8 MR. HUGHES: If this case went to trial the
9 Government's evidence would show that on August 24, 1972,
10 Calvin Ronald DeVyver purchased four boxes of hand-gun
11 ammunition from Sam's Department Store, Incorporated also
12 known as Sam's Army and Navy store, in Brattleboro, Vermont,
13 which is a federally licensed dealer. By identifying himself
14 as the Reverend Brian R. Phillips, Route I, Burlington, Vermont,
15 the means of identification he used was a Vermont resident
16 fishing license. The evidence would show that at this time,
17 Mr. DeVyver was and always had been a resident of New York
18 State. Also the evidence would show that on June 13th, 1972,
19 Mr. DeVyver purchased this hunting license at Wilson's Sports
20 Equipment Corporation, in Burlington, Vermont, using the
21 name of Reverend Brian R. Phillips, Route I, Burlington,
22 Vermont; by using for identification a Vermont Operator's
23 License, birth date given as February 10, 1945, and place of
24 birth being given as Vergennes, Vermont. The evidence would
25 further show that there never has been a listing for a
26 Brian R. Phillips as having a valid Vermont Operator's License.

27 THE COURT: Well, we are concerned primarily

1 with Count I.

2 MR. HUGHES: That's what I'm talking about,
3 Your Honor, that there were no birth records in Vergennes,
4 Vermont, reflecting a birth of Brian R. Phillips, on February
5 10, 1945, and that no person known as Brian R. Phillips ever
6 resided at Route I, Burlington, Vermont. Also on the 24th of
7 August, 1972, a Mr. DeVyver was arrested, he had produced for
8 identification a New York Operator's License under the name
9 of Ronald J. Phillips of 666th Fifth Avenue, New York; the
10 evidence would show that this drivers license was not a valid
11 license and had never been issued by New York State, he also
12 had on his person an original duplicate Selective Service
13 Registration Certificate issued to Ronald James Phillips and
14 by local board number 4, here in Vermont, the evidence would
15 show that this card was false. The Government would also show
16 that Mr. DeVyver used false identification on numerous prior
17 occasions to purchase hand-guns in Vermont. That's all I have,
18 Your Honor.

19 THE COURT: Mr. DeVyver, do you understand
20 the evidence that the Government would present against you
21 if the case went to trial?

22 MR. DeVyver: Yes, sir.

23 THE COURT: Now have any threats or promises
24 been made to persuade you to enter a plea of guilty in this
25 case?

26 MR. DeVyver: Just that it's my understanding
27 that the Counts II through Count V would be withdrawn and that

1 the U.S. Attorney would make no statements at the time of
2 sentencing.

3 THE COURT: And has anybody undertaken to
4 predict to you the sentence that the Court will impose in this
5 case?

6 MR. DeVyver: No, sir.

7 THE COURT: And it appears from your state-
8 ment that you did in fact purchase ammunition, using a Vermont
9 fishing license?

10 MR. DeVyver: Yes, sir.

11 THE COURT: At the time and place in question
12 and that you did so willfully and knowingly?

13 MR. DeVyver: Yes, sir.

14 THE COURT: Whose fishing license did you use?

15 MR. DeVyver: My own, sir.

16 THE COURT: I'll ask you to tell me in your
17 own words exactly what you did do on this particular day.

18 MR. DeVyver: Someone who was with me asked
19 me if I would go into Sam's Army Navy Store while he went into
20 another store to save time and buy him some ammunition. I went
21 into Sam's Army Navy Store and ordered the ammunition that
22 was requested, the clerk asked me if I had a drivers license
23 or a fishing license or hunting license and I showed him the
24 Vermont hunting license which I,-- excuse me, the Vermont
25 fishing license which I had secured several months previously.

26 THE COURT: And what name is that registered
27 in?

1 MR. DeVyver: My name, sir.

2 THE COURT: Mr. West, what is your understand-
3 ing of the, -- any discussions you may have had with the
4 United States Attorney in this case?

5 MR. WEST: Well the same as indicated by
6 Mr. DeVyver, Your Honor, that Counts II through Count V will
7 be withdrawn and at the time of sentencing the United States
8 Attorney will make no statements regarding sentence.

9 THE COURT: Is that the limit, Mr. Hughes?

10 MR. HUGHES: Yes it is, Your Honor, the
11 remaining four counts will be dismissed under Rule 48-A, at
12 the time of sentencing and we will make no statements at the
13 time of sentence.

14 THE COURT: Having in mind the Court's
15 explanation of your rights and your, -- the Government's
16 statement concerning the factual background and the evidence
17 that would be presented in this case, do you still wish to
18 enter a, -- to change your plea of Count I from not guilty to
19 guilty?

20 MR. DeVyver: Yes, Your Honor.

21 THE COURT: And, Mr. West, do know of any
22 reason why the Defendant should not plead guilty to this
23 offense as charged in Count I?

24 MR. WEST: No, I do not, Your Honor.

25 THE COURT: The Court will indicate that
26 it has in mind the discussions that have taken place and that
27 the remaining counts of the indictment at the time of

1 sentencing will be, -- the Government will move for a
2 dismissal and at this time the Court sees no reason why it
3 shouldn't approve of that disposition, however the Court will
4 require a pre-sentence investigation at least to bring the
5 case up to date and that will be so ordered. The Court will
6 accept the plea of that, the Defendant, DeVyver has tendered
7 to Count I of the indictment and in doing so I find that the
8 plea is knowingly made, that it is voluntary and has a basis
9 in fact that contains all the essential elements of the crime
10 charged in Count I and therefore is accepted. As I indicated,
11 the Court will request the United States Probation Officer
12 to make an investigation and report to the Court. The case
13 will be continued until that report has been completed.

14 How about the matter of bail in this case?

15 MR. HUGHES: Your Honor, as the case now
16 stands I think there is a five-thousand dollar personal
17 recognizance bond without security, the Government would wish
18 that kept as is.

19 THE COURT: Very well, we'll continue the
20 bail as originally imposed in this case and the conditions of
21 a release will remain the same.

22 (10:12)
23
24
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CERTIFICATE

I, Herman J. Vesper, Official Court Reporter, United States District Court, For The District of Vermont, hereby certify that the foregoing is a true and accurate transcript of that portion of the proceedings dealing directly with the change of plea, in the case of THE UNITED STATES OF AMERICA versus CALVIN RONALD DeVyver, Criminal Action # 6850, which was held befofe the Honorable JAMES S. HOLDEN, Chief U. S. District Judge, for The District of Vermont, at Rutland, Vermont March 15, 1976.

Herman J. Vesper

Official Court Reporter

Rutland, Vermont

July 22, 1977

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 DISTRICT OF VERMONT
4
5

6 -----)
7 The United States of America)
8)
9)

10 vs.)

11 Criminal Action #6850
12)
13)

14 CALVIN RONALD DeVyver et al.,)
15 -----)

16
17 Hearing before the Honorable JAMES S. HOLDEN, Chief,
18 U.S. District Judge, For the District of Vermont,
19 at Rutland, Vermont, 7 May, 1976, for sentence
20 on Count I; and Dismissal of remaining Counts.
21
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28 APPEARANCES:

29 The Honorable GEORGE W.F. COOK
30 United States Attorney

31 ROBERT E. WEST, Esquire
32 Attorney for the Defendant

1 (11:30 a.m., 7 May 1976

2 THE CLERK: Your Honor, the case now
3 before the Court is the case of The United States of America
4 versus CALVIN RONALD DeVyver, Criminal Action #6850, for sen-
5 tence on Count I; and Dismissal of remaining Counts. The
6 attorney for the Government is GEORGE W.F. COOK. The attorney
7 for the Defence is ROBERT E. WEST Esquire. The defendant is
8 in Court with his Attorney.

9 THE COURT: (Looking over his papers.)
10 Mr. WEST, have you had an opportunity to review the indictment
11 report filed by the Probation Officer, in case

12 MR. WEST: Yes, I have, Your Honor.

13 THE COURT: Have you gone over it with
14 the Defendant?

15 MR. WEST: Yes I have.

16 THE COURT: Are there any changes or
17 ramifications, that should be made to the supplemental report?

18 MR. WEST: No, I do not believe so,
19 Your Honor.

20 THE COURT: Mr. DeVyver, have you read
21 the supplementary report?

22 MR. DeVyver: Yes.

23 THE COURT: Supplied by the Probation
24 Officer. Do you have any changes that you would offer?

25 MR. DeVyver: No, sir.

26 THE COURT: Do you know, MR. WEST, any
27 reason why sentence should not be imposed at this time?

1 MR. WEST: No, I do not, although, I
2 would hope that the Court would give me an opportunity to make
3 some remarks with regard to the sentence at the appropriate
4 time.

5 THE COURT: Certainly. MR. DeVyver, do
6 you know any reason why the Court should not impose sentence
7 in your case at this time?

8 MR. DeVyver: No, sir.

9 THE COURT: Very well, MR. WEST, you may
10 present anything you wish to advance in your client's behalf
11 or any further information that may bear on the litigation of
12 punishment in this case.

13 MR. WEST: If it please the Court, the
14 Court does have a very complete pre-sentence investigation
15 report before it. Not only the report by which was made earl-
16 ier, but the supplemental report and documents which accompany
17 it. I would simply like to reemphasize various factors in
18 connection with this matter.

19 What we are concerned with, is a single
20 Count of using false identification to make a purchase of
21 ammunition. Even though this is an offense which the Congress
22 has treated reasonably seriously insofar as a maximum penalty
23 is concerned I would submit to the Court that the particular
24 incident which occurred here in Vermont in 1972 was not of
25 that serious nature. On that date in 1972 Mr. DeVyver was
26 with a companion in Brattleboro, Vermont and if there had
27 been a trial it would have, the testimony of both Mr. DeVyver

1 and his companion who earlier made an affidavit to this effect,
2 that Mr. DeVyer did not purchase this ammunition for himself
3 or for any benefit for himself but rather purchased it at the
4 request of his companion. So that his connection with regard
5 to the purchase was incidental and the matter of identification
6 was simply a matter that he had come here to do some fishing
7 and as we are all well aware the resident fishing license fee
8 is considerably lower than that of the non-resident fee. So
9 I would like to emphasize what I think is obvious in this case
10 and that is that this particular incident in and of itself
11 was not of that serious a nature. An incident with regard to
12 which Mr. DeVyer did not and would not in any manner gainfully
13 profit, an incident with regard to which there was no threat to
14 any person, simply a really minor property offense. When you
15 get an offense of this nature one then has to look beyond the
16 offense itself to other factors. When considering what sentence
17 is most appropriate. What we have here is a situation which the
18 Defendant, Mr. DeVyer is now 41 years of age. The Court is
19 aware from perusing the pre-sentence investigation report that
20 as in so many other cases that this Court is familiar with
21 as a result of as many years of experience in the courts of
22 this State, that Mr. DeVyer is very typical insofar as many
23 other people are concerned in similar situations in that during
24 his younger years for reasons which are apparent from the pre-
25 sentence report, he did have some problems. Some serious prob-
26 lems, but as also happens in many of these cases as he has
27 matured as he has grown older as he has had the assistance of

1 (At this juncture, the transcript of the remaining colloquy
2 is being omitted and will proceed now with the actual sentencing)

3 * * * *

4 THE COURT: Mr. DeVyver is there anything you wish to
5 say to the Court before sentencing is imposed?

6 MR. DeVyver: No, thank you, Your Honor.

7 THE COURT: Mr. COOK, is there anything that you have to,--

8 MR. COOK: Mr. WEST has told me, I would have said something
9 briefly but Mr. WEST has told me that he had a plea bargain
10 with Mr. HUGHES who handled this case at the time of the plea
11 that the Government would not say anything at sentencing.
12 Usually, our usual - I'd like to be sure that I am right, Mr.
13 West, usually, if we get into this position at all we make the
14 agreement that we do not make any recommendations in sentenc-
15 ing but we do not usually agree we will not say anything. Am
16 I correct?

17 MR. WEST: That's correct, but it is on the record.

18 THE COURT: If there is anything you have to say the
19 Court will hear it.

20 MR. COOK: The only thing I wish to say, the Government
21 does consider this a serious matter and it is a part of a
22 serious episode. We have no recommendation, Your Honor, but
23 we did consider this a serious case, much more serious than Mr.
24 WEST has represented.

25 THE COURT: Well, the Court has reviewed the file and
26 apparently Judge COFFRIN at the time of the sentencing was
27 imposed, initially, after a thorough and thoughtful study, had

1 been completed was also persuaded that it was a serious mat-
2 ter. The Court has given the whole file attention and particu-
3 larly the supplemental report of the Chief United States
4 Probation Officer, which was done at the Court's request.
5 I feel that the sentence as originally imposed was certainly
6 well-founded, but in view of the fact that the Defendant has
7 served that portion of the sentence under the provisions of
8 Section 4208(a) (2) and the Bureau of Prisons saw fit to release
9 him on March 4, 1975 the Court does not, is not convinced that
10 further incarceration would serve any useful purpose, despite
11 the background which certainly is most of it, is as indicated in
12 the original pre-sentence report is not conducive to probation
13 but in view of the fact that the Defendant has served the time
14 that was originally imposed and for reasons best known to him
15 and his attorney, the petition to have the sentence vacated
16 after the sentence had been served in substance, except the
17 parole, the Court feels that under all the circumstances I
18 will direct the Defendant be committed to the custody of the
19 Attorney General for a period of 42 months, the execution of
20 the sentence of imprisonment is suspended and the Defendant
21 will be placed on probation for a period of 2 years.

22 Count - the Court; at this time approves the recommenda-
23 tions made at the time the plea of "guilty" was entered as to
24 Count One and approves the understanding that was presented
25 at that time concerning the negotiations that took place between
26 the States Attorney, the United States Attorney's office
27 and counsel for the Defendant.

1 MR. COOK: At this time we would move that Counts 2
2 through 5 be dismissed, Your Honor.

3 THE COURT: Yes, it should be abundantly clear that the
4 sentence imposed on Defendant's plea of "guilty" to Count One
5 of the indictment, Counts 2 through 5 are dismissed, in accord-
6 ance with the motion of the United States Attorney.

7 MR. WEST: If it Please the Court, I hope that is all
8 that is necessary with regard to a complete dismissal of those
9 counts so that they never could be brought again. I only
10 point this out because it was my understanding in 1973 at the
11 time of the earlier sentencing that a dismissal was made such
12 that the counts could not be brought again and yet the Govern-
13 ment was permitted to bring those counts again in connection
14 with the present proceedings and it was based on an assertion
15 that the alleged dismissal which had taken place at that time
16 was not sufficient to accomplish that purpose and I am refer-
17 ring to page 15 of the transcript of the sentencing proceedings
18 in which Mr. COOK at that time stated Your Honor, at this time
19 the Government would move to dismiss Counts 2,3,4,5 the Court
20 stated "All right, Counts 2,3,4,5 are hereby dismissed," and
21 I just want to make certain this time that this is all suf-
22 ficient so that under no circumstances could those counts be
23 reinstated.

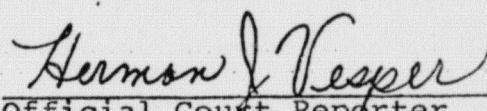
24 THE COURT: Well I think the counts are reinstated when the
25 2254 proceedings held before Judge COFFRIN and the motion to
26 the plea of "guilty" as originally entered was vacated and I
27 think that let it right where it was originally, the indictment,

1 and the Court made no different disposition in this case, the
2 plea agreement such as it was, was advanced to the Court that
3 was the understanding the Court approved the plea agreement
4 and dismissed the counts on counts 2,3,4,5 as set forth in
5 the plea agreement and the count, sentence is imposed on count
6 one.

7 MR. WEST: Thank you.

8 THE COURT: Proceed with the next case.

9 -----
10 I, Herman J. Vesper, Official Court Reporter, United States
11 District Court, For The District of Vermont, hereby certify
12 that the foregoing is a true and accurate transcript of that
13 portion of the proceedings dealing directly with the
14 sentencing, in the case of THE UNITED STATES OF AMERICA versus
15 CALVIN RONALD DeVyver, Criminal Action #6850, which was held
16 before the Honorable JAMES S. HOLDEN, Chief U.S. District
17 Judge, for The District of Vermont, at Rutland, Vermont
18 May 7, 1976.

19 
20 Official Court Reporter

21
22 July 25, 1977
23 Rutland, Vermont
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CALVIN RONALD DeVYVER,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

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Civil No. _____

23

MOTION TO VACATE AND SET ASIDE CONVICTION AND JUDGMENT
PURSUANT TO 28 U.S.C. SECTION 2255

Comes now Calvin Ronald DeVyver, Petitioner, and moves this Honorable Court pursuant to 28 U.S.C. 2255 to enter an Order to vacate and set aside his conviction and judgment, upon the following grounds and reasons:

1. Petitioner was sentenced to a term of three years and six months for a violation of 18 U.S.C. Section 922(a)(6), and the sentence began August 10, 1973. (See, Sentence Computation Record Appendix A, and Final Judgment and Commitment, Appendix B, Attached).
2. Petitioner moved to vacate and set aside the conviction and sentence by motion pursuant to 28 U.S.C. Section 2255, filed July 28, 1975 and by amendment filed August 4, 1975.
3. The court granted Petitioner's Motion to Vacate and Set Aside the Conviction and Sentence on January 6, 1976. As a result of a subsequent plea and judgment of guilty to the same charge, the court, on May 7, 1976, sentenced Petitioner to a term of three years and six months imprisonment, suspended, and probation for a period of two years. (See, Conditions of Probation, Appendix C, Attached).
4. Petitioner is currently in the custody of the United States Probation Officer in service of that sentence.
5. The sentence was imposed in violation of the Constitution and laws of the United States in that the court was without jurisdiction to impose the sentence for the reason that at the time of the entry of plea the Assistant United States Attorney, as part of the plea bargain entered into, promised to make no remarks or recommendations at the time of sentencing, but the United States

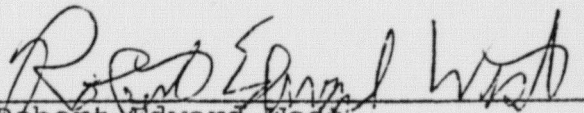
Attorney broke this agreement at the time of sentencing and made remarks and recommendations to the court regarding the Petitioner.

6. As a result of the foregoing, Petitioner submits that his plea was neither voluntary nor intelligently entered, and that, accordingly, the plea was constitutionally unacceptable.

7. No application for the relief sought herein has been made in this or any other court.

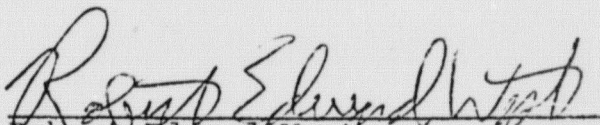
WHEREFORE, for all of the foregoing reasons, Petitioner prays for an Order of the court vacating and setting aside the conviction and judgment in the instant matter, and granting the herein Motion in all respects, and for such other and further relief as to the court may appear appropriate and just.

DATED AT Rutland, Vermont this 13th day of July, 1977.

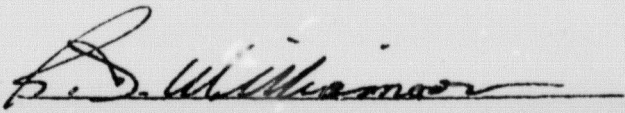

Robert Edward West
Attorney for Calvin R. DeVyer

AFFIDAVIT

Robert Edward West, Attorney for Calvin R. DeVyer, first being duly sworn, deposes and says that he represents the Petitioner in the above entitled matter, and that the contents thereof are true and correct to the best of his knowledge and belief.


Robert Edward West

Sworn and subscribed to before me this 13 day of 7, 1977.

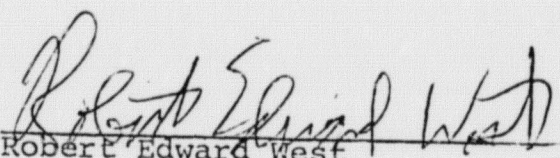


CERTIFICATE OF SERVICE

ROBERT EDWARD WEST
LAWYER
RUTLAND, VT. 05701

I, Robert Edward West, attorney for Calvin R. DeVyver, do hereby certify that I served the foregoing Motion to Vacate and Set Aside Conviction and Judgment on the Respondent by mailing a copy of the same to its attorney of record, John R. Hughes, Jr.,

Assistant United States Attorney, Rutland, Vermont, 05701, this
13th day of July, 1977.


Robert Edward West
Attorney for Calvin R. DeVyver

SENTENCE COMPUTATION RECORD

APPENDIX A

26

1. REGISTER NO. 71655-158		2. NAME (LAST, FIRST, MIDDLE) DE VYVER, Calvin Ronald		3. INSTITUTIONS OF CONFINEMENT IN SEQUENCE LEW	
4. DATE OF BIRTH (MO., DAY, YR.) 02-10-45		5. PRISON NO. 314 223 C 428		6. RACE 1	
7. SENTENCE NUMBER 1		8. DOCKET NO. 6850		9. DOCKET NO. 6850	
10. DATE REPARDED OR CHANGED 08-29-73		11. DATE SENTENCED 08-03-73		12. DATE COMMITTED 08-20-73	
13. DATE COMMITTED BY FOLLOWING METHOD 106		14. INST. SYMBOL L208(b) Study		15. INST. SYMBOL L208(b) study	
16. HOW COMMITTED 02450		17. DISTRICT Vt		18. DISTRICT VT	
19. JUDGE COFFRIN, A. W.		20. JUDGE COFFRIN, A. W.		21. OFFENSE Viol. Firearms Act	
22. OFFENSE Viol. Firearms Act		23. SOF OFFENSE CODE 11		24. SENTENCE PROCEDURE L208(b)	
25. SENTENCE IMPOSED 30-99-99 = LIFE 99-99-99 = DEATH		26. NEW TERM OF THIS SENTENCE 05-00-00		27. BASIS FOR CHANGE 18	
28. FINE/COSTS: COMM. = 1 NOT COMM. = 2		29. PROBATION: REVOKED = 1 TO FOLLOW = 2		30. JAIL CREDIT	
31. INOPERATIVE TIME		32. IDENTIFY SENTENCES INCLUDED IN FOLLOWING SENTENCE COMPUTATION(S) BY SENTENCE NUMBER(S)		33. TOTAL TERM NOW IN EFFECT	
34. SENTENCE BEGAN OR WARRANT EXECUTED		35. EXPIRES FULL TERM		36. FULL TERM LESS 180 DAYS	
37. GOOD TIME ALLOWANCE AND RATE		38. MANDATORY RELEASE OR EXPIRES WITH GOOD TIME		39. ELIGIBLE FOR PAROLE	
40. REMARKS		41. REMARKS		42. REMARKS	

12-03-73 Ret. to Crt.
Sentence stayed until 08-10-73

MARCH

27

February 25, 1974

TO : All Concerned
FROM : G. L. Casler, AV(P)

SUBJECT: AUTHORIZATION FOR AWARDS OF MERITORIOUS PAY AND/OR GOOD TIME:

Under the provisions of Policy Statement 7600.50, CH-2, dated March 6, 1972, the below listed men are hereby granted meritorious pay and/or good time.

MERITORIOUS PAY AND MERITORIOUS GOOD TIME

NAME	NUMBER	AMOUNT	EFFECTIVE	DATE EFFECTIVE
ALEXANDER, Oscar	35235-13310	*	*	02-01-74
ANDERSON, Robert	39097-13310	*	*	02-01-74
ATANASIO, Edward	75111-15810	*	*	10-01-73
BARNES	36892-13310	*	*	10-01-73
BASS	39097-13310	*	*	12-01-73
BASTONE, Joseph	69401-15810	\$10.00	02-01-74	02-01-74
BITTNER, Rolf	76052-15810	\$10.00	02-01-74	*
BLAUFARB, Stephen	79105-15810	\$10.00	02-01-74	*
BROWN, Ivan	21601-14510	*	*	11-01-73
BUCCIANO, Nobila	75111-15810	\$15.00	02-01-74	*
CARABALLO, R.	75929-15810	*	*	01-01-74
CARLISLE, J.	31001-13310	*	*	01-01-74
CHESLEY	30023-13310	\$10.00	02-01-74	01-01-74
CLAWSON, Wayne	35165-13310	\$10.00	02-01-74	*
COLEMAN, Arthur	38091-13310	*	*	02-01-74
COLON, Vincente	71137-15810	\$10.00	02-01-74	02-01-74
COLON-PERAZA, W.	37106-13310	\$15.00	02-01-74	*
COMI, Eugene	39039-13310	*	*	01-01-74
DAVILLE, Donald	55788-13310	*	*	02-01-74
DAVIS, Cornelius	30150-13310	*	*	11-01-73
DESIST, Samuel	32928-13310	\$15.00	02-01-74	*
DIPETRANTONIO, R.	25109-13310	\$10.00	02-01-74	06-01-73
DISHUE, Olin S.	96116-13310	\$10.00	02-01-74	02-01-74
DE VIVER, Carl	71655-15810	*	*	12-01-73
DRIGGERS, Roy	38321-13310	\$10.00	02-01-74	01-01-74
EVANS, Clyde	76577-15810	*	*	02-01-74
FAUCHEUX, Kenneth	73157-15810	\$10.00	02-01-74	*
XXXXXXXXXXXXXXXXXXXXXXXXXXXX				
GALLECCIO, Louis	79267-15810	*	*	02-01-74
GARCIA, Antonio	59330-15810	*	*	02-01-74
GARCIA, Juan H.	70101-15810	*	*	02-01-74
GILLIS, Claudell	79035-13310	\$15.00	02-01-74	*
GODIN, George J.	25559-13310	\$15.00	02-01-74	11-01-73
GOODNIGHT, James	39170-13310	\$10.00	02-01-74	02-01-74
HAMILTON, George	75121-15810	\$10.00	02-01-74	*

United States District Court

FOR THE

DISTRICT OF VERMONT

United States of America

v.

Criminal

No. 6850

CALVIN RONALD deVYVER, aka

On this 10th day of December, 19 73 came the attorney for the government and the defendant appeared in person and¹ by counsel.

It Is ADJUDGED that the defendant upon his plea of² guilty has been convicted of the offense of violating of Sections 922(a)(6) and 924(a) of Title 18 of the United States Code

as charged³ in Count I and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is ADJUDGED that the defendant is guilty as charged and convicted.

It Is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ~~from 5 years to 3 years~~ and 6 months; defendant to receive credit for time served under Section 4208(a)(2) of Title 18, United States Code.

It Is ADJUDGED that⁵ defendant to become eligible for parole at such time that the Parole Board shall determine.

It Is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the

UNITED STATES DISTRICT COURT
FOR THE
District of Vermont

To Calvin Ronald DeVyver
34-06 81st Street
Address Jackson Heights, New York

Docket No. 6850

In accordance with authority conferred by the United States Probation Law, you have been placed on probation this date, May 7, 1976, for a period of two (2) years by the Hon. James S. Holden United States District Judge, sitting in and for this District Court at Rutland, Vermont.

CONDITIONS OF PROBATION

It is the order of the Court that you shall comply with the following conditions of probation:

- (1) You shall refrain from violation of any law (federal, state, and local). You shall get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.
- (2) You shall associate only with law-abiding persons and maintain reasonable hours.
- (3) You shall work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work you shall notify your probation officer at once. You shall consult him prior to job changes.
- (4) You shall not leave the judicial district without permission of the probation officer.
- (5) You shall notify your probation officer immediately of any change in your place of residence.
- (6) You shall follow the probation officer's instructions.
- (7) You shall report to the probation officer as directed.

The special conditions ordered by the Court are as follows:

Forty-two (42) months; ESS; probation, two (2) years

I understand that the Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

I have read or had read to me the above conditions of probation. I fully understand them and I will abide by them.

(Signed) Calvin R. DeVyver
Probationer

5/7/76
Date

You will report as follows:

In person as directed; and by mailing Probation Form #8 on the first day of each month to - James F. Haran, Chief U.S. Probation Officer, 304 U.S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201

James F. Haran
U. S. Probation Officer

5/7/76
Date

DISTRICT OF VERMONT

30

CALVIN RONALD DeVYVER,

*
*
*
*
*
*
*

Petitioner,

VS.

Civil No. _____

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OF LAWBREAKING OF PLEA BARGAIN BY PROSECUTOR IS VIOLATIVE OF
PETITIONER-DEFENDANT'S CONSTITUTIONAL SAFEGUARDS UNDER THE
5TH AMENDMENT TO THE UNITED STATES CONSTITUTION

In this case the petitioner-defendant pleaded not guilty to a five count indictment. Petitioner and his defense counsel subsequently entered into a plea bargain that the petitioner would enter a plea of guilty to one count if the prosecutor dropped the other four counts and if the prosecutor refrained from making any remarks at the time of sentencing. The prosecutor's agreement not to make any remarks at sentencing was a critical part of the plea bargain as far as petitioner was concerned because he felt that the prosecutor's remarks at an earlier voided sentencing had been highly inflammatory.

The rule governing this case was definitively set forth in *Santobello v. New York*, 404 US 257, 30 L Ed 427, 92 S Ct 495 (1971). The facts of *Santobello* were completely analagous with the facts in the instant case. In *Santobello* the prosecutor agreed not to make any remarks at sentencing, but when the sentencing date arrived another prosecutor appeared and, over the objections of defense counsel, was permitted to make remarks.

For the Court Mr. Chief Justice Berger stated,

"This record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them. The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." (emphasis added) (404 US 257, 260).

The Court continued,

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"The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known.

"This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. These circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (emphasis added) (404 US 257, 261-262).

In vacating the judgment the Court concluded,

"On this record, petitioner 'bargained' and negotiated for a particular plea in order to secure dismissal of more serious charges, but also on condition that no sentence recommendation would be made by the prosecutor. It is now conceded that the promise to abstain from a recommendation was made, and at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial. The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach of agreement was inadvertent does not lessen its impact." (emphasis added) (404 US 257, 262, supra).

Mr. Chief Justice Burger ruled for a unanimous Court of seven and indicated that on remand the state court should determine if "the circumstances require granting...the opportunity to withdraw his plea of guilty" or "whether the circumstances require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge." (404 US 257, 263, supra).

However, a majority (four) of the Court believed that in cases like this, when the defendant seeks to vacate the plea, that relief should generally be granted. In an opinion joined by Mr. Justice Brennan and Mr. Justice Stewart, Mr. Justice Marshall stated,

"At least where the government itself has broken the plea bargain, this disappointment cannot bar petitioner from withdrawing his guilty plea and reclaiming his right to a trial.

"I would remand the case with instructions that the plea be vacated and petitioner be given an opportunity to replead to the original charges in the indictment." (404 US 257, 260, supra)

In a concurring opinion Mr. Justice Douglas stated,

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"The lower courts, however, have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain, most jurisdictions preferring vacation of the plea on the ground of 'involuntariness,' while a few permit only specific enforcement. Note: Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U Pa L Rev 865, 876 (1964). As one author has stated, the basis for outright vacation is 'an outraged sense of fairness' when a prosecutor breaches his promise in connection with sentencing. D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 36 (1966)." (404 US 257, 266, supra).

"Where the 'plea bargain' is not kept by the prosecutor, the sentence must be vacated and the state court will decide in light of the circumstances of each case whether due process requires (a) that there be specific performance of the plea bargain or (b) that the defendant be given the option to go to trial on the original charges. One alternative may do justice in one case, and the other in a different case. In choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State. (emphasis added) (404 US 257, 266-267).

Review of the many cases following Santobello reveal that the courts have, indeed, given the "defendant's preference considerable, if not controlling, weight".

In vacating a District Court conviction and dismissing an indictment in U.S. v. Garcia 519 F.2d 1343, 1345 (9th Cir. 1975), the court ruled,

"In Santobello, the Supreme Court held that when a prosecutor makes a promise which serves as consideration or inducement for a guilty plea, the promise must be fulfilled. 404 U.S. at 262, 92 S. Ct. 495. More broadly, our court has written that '...when the prosecution makes a "deal" within its authority and the defendant relies on it in good faith, the court will not let the defendant be prejudiced as a result of that reliance.' United States V. Goodrich, 493 F.2d 390, 393 (9th Cir. 1974)."

Among the most recent cases following Santobello is Palermo v. Warden, Greent Haven State Prison, 545 F.2d (2d Cir. 1976). In affirming relief granted by the District Court, Judges Meskill and Waterman stated,

"Santobello v. New York, supra, 404 U.S. at 262, 92 S. Ct. at 499, established that 'when a plea rests in any significant degree on a promise or agreement of the

prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.' Resting on principles of fairness in securing such an agreement and the adjudicative element inherent in accepting a plea, Santobello focussed on an 'appropriate recognition of the duties of the prosecutor in relation to promises made' in plea negotiations. Id. Neither the inadvertence of the breach nor its possibly harmless effect obviated the need for remand to the state court for appropriate relief.

"Clearly, then, Santobello requires relief when the prosecutor fails to fulfill promises within his power made in negotiating a plea bargain."

It was inexcusable that in this case "the left hand did not know what the right hand is doing". Since the petitioner feels that he was greatly prejudiced by the remarks of the U.S. Attorney in violation of the plea agreement, the judgment must be vacated.

DATED at Rutland, County of Rutland and State of Vermont
this 19th day of July, 1977.

Robert Edward West
Attorney for Calvin Ronald DeVyver

CERTIFICATE OF SERVICE

This is to certify that on the 19th day of July, 1977, I served a copy of the above Memorandum of Law with a copy of this Certificate appended thereto upon the United States in this matter by mailing a true conformed copy to John R. Hughes, Jr. Assistant United States Attorney, Rutland, Vermont 05701.

Robert Edward West
Attorney for Calvin Ronald DeVyver

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

34

CALVIN RONALD DeVYVER

v.

Civil No. 75-181

UNITED STATES OF AMERICA

GOVERNMENT'S RESPONSE TO CALVIN RONALD
DeVYVER'S MOTION TO VACATE AND SET ASIDE
CONVICTION AND JUDGMENT PURSUANT TO 28 U.S.C. § 2255

Now comes the UNITED STATES OF AMERICA and moves to oppose CALVIN RONALD DeVYVER'S Motion to Vacate and Set Aside Conviction and Judgment in the above-captioned matter.

CALVIN RONALD DeVYVER claims that the Court was without jurisdiction to impose sentence in this matter because he claims that he was denied due process of law when the United States Attorney made remarks at the time of sentencing as the Government had entered into a plea bargain promising that no statements would be made.

The record is very clear that the only comments made at sentencing did not concern recommendations for sentence but only commented on the facts. These comments were made by the United States Attorney, George W.F. Cook, and were as follows:

The only thing I wish to say, the Government does consider this a serious matter and it is a part of a serious episode. We have no recommendation, your Honor, but we did consider this a serious case, much more serious than Mr. West has represented.

The Government contends that CALVIN RONALD DeVYVER'S claim for vacation of judgment might be well founded if

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the plea agreement agreed upon were as he alleges it to be. Although it is not clear from the statement made by the Government attorney at the time of the plea that no statements were to be made concerning sentencing only, the attorney for CALVIN RONALD DeVYVER made this point very clear at that time as is evidenced by the verbatim copy of the transcript which follows:

The Court: Mr. West, what is your understanding of the, -- any discussions you may have had with the United States Attorney in this case?

Mr. West: Well the same is indicated by Mr. DeVyver, your Honor, that counts II-V will be withdrawn and at the time of sentencing the United States Attorney will make no statements regarding sentence. (Emphasis added)

The Court: Is that the limit Mr. Hughes?

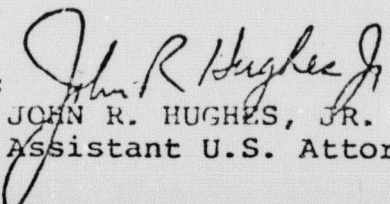
Mr. Hughes: Yes it is, your Honor, the remaining four counts will be dismissed under Rule 48A, at the time of sentencing we will make no statements at the time of sentence.

Reading the transcript of the change of plea on March 15, 1976 in light of the Affidavit of Assistant U.S. Attorney John R. Hughes, Jr., which is attached, it is clear that the Government did not violate the terms of any plea agreement and thus CALVIN RONALD DeVYVER'S Motion to Vacate and Set Aside the Conviction and Judgment should be denied.

DATED at Rutland, in the District of Vermont,
this 19th day of August, 1977.

UNITED STATES OF AMERICA

GEORGE W.F. COOK
United States Attorney

By: 
JOHN R. HUGHES, JR.
Assistant U.S. Attorney

32

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

CALVIN RONALD DeVYVER

v.

Civil No.

UNITED STATES OF AMERICA

AFFIDAVIT

I, John R. Hughes, Jr., being duly sworn, hereby depose and state the following facts which I believe to be true to the best of my knowledge and belief:

1. I am an Assistant U.S. Attorney for the District of Vermont.

2. I personally handled the case of United States of America v. Calvin Ronald DeVyver a/k/a Reverend Michael Itkin a/k/a Reverend Ronald Phillips a/k/a Reverend Bryan R. Phillips, Criminal No. 6850 from January 7, 1976 until Calvin Ronald DeVyver changed his plea before the Honorable James S. Holden, Chief U.S. District Judge for the District of Vermont, at Rutland, Vermont, on March 15, 1976.

3. I entered into plea negotiations with Robert E. West, Esq., attorney for Calvin Ronald DeVyver and reached the following plea agreement. In exchange for Calvin Ronald DeVyver entering a plea of guilty to count I of the indictment, the Government agreed to dismiss counts II-V at the time of sentencing and to make no remarks or recommendations concerning sentencing at the time of sentencing.

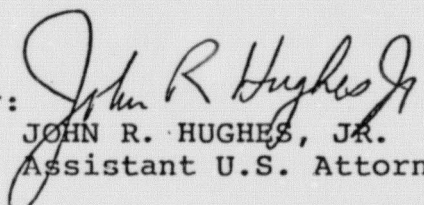
4. At no time did I enter into a plea agreement with Robert E. West, Esq., agreeing or promising to make no remarks at the time of sentencing.

5. Since assuming my position as Assistant U.S. Attorney for the District of Vermont on December 15, 1975 I have never made it a part of a plea bargain that I would make no remarks about the facts of the case at the time of sentencing.

DATED at Rutland, in the District of Vermont,
this 19th day of August, 1977.

UNITED STATES OF AMERICA

GEORGE W.F. COOK
United States Attorney

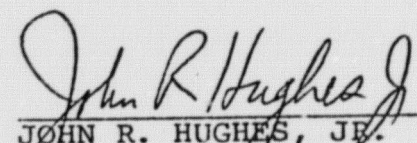
By: 
JOHN R. HUGHES, JR.
Assistant U.S. Attorney

Sworn and subscribed before me this 19th day of
August, 1977.

LYNN McLAIN, Notary Public
My commission expires 2/9/79

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of August, 1977, mailed a copy of the foregoing GOVERNMENT'S RESPONSE TO CALVIN RONALD DeVYVER'S MOTION TO VACATE AND SET ASIDE CONVICTION AND JUDGMENT PURSUANT TO 28 U.S.C. § 2255 to Robert E. West, Esq., attorney for plaintiff, postage prepaid, along with attached Affidavit.



JOHN R. HUGHES, JR.
Assistant U.S. Attorney

Petitioner, *
*
VS. * Civil No. 75-181
*
UNITED STATES OF AMERICA, *
*
Respondent. *

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PETITIONER'S REPLY TO GOVERNMENT'S RESPONSE

Comes now Calvin Ronald DeVyver, Petitioner, and replies to the Government's Response as follows:

The Assistant United State's Attorney, having found himself in a classic case of not "letting the left hand know what the right hand is doing" (Santobello v. New York, 404 US 257, 262, 30 L Ed 427, 92 S Ct 495 (1971)), now attempts to explain the United State's Attorneys inflammatory remarks at sentencing away semantically. The Assistant United State's Attorney not only relies on semantics but misstates matters as well.

The statement in the Government's Response that, "The record is very clear that the only comments made at sentencing did not concern recommendations for sentence..." (Government's Response, Page 1, Par. 3) (emphasis added), implies misleadingly that the issue is recommendations for sentence. The issue is not only whether the Government agreed not to make recommendations but that the Government agreed not to make any remarks at all at sentencing (Petitioner's Motion to Vacate, Par. 5).

The Government not only misstates Petitioner's position but then attempts to explain it away semantically by suggesting that the Government had reserved the right to comment on the facts and that the United State's Attorney's statement was a "comment on the facts". The United State's Attorney's statement is unquestioned,

"MR. COOK: The only thing I wish to say, the Government does consider this a serious matter and it is a part of a serious episode. We have no recommendation, Your Honor, but we did consider this a serious case, much more serious than Mr. WEST has represented." (Sentencing Transcript, Page 5)

ROBERT EDWARD WEST
LAWYER

301 CHATEAU ROAD
RUTLAND, VT. 05701

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It is incomprehensible how anyone can characterize that statement as a "statement on the facts". The statement does with not deal/che fishi license, petitioner's residence or any other fact of the case. It is plainly nothing more than a prejudicial subjective characterization of the Government's attitude or view of the case.

In any event, the issue is not whether that statement constitutes a statement on the facts or not but, rather, whether the Government had agreed not to make any statement at all at sentencing. The understanding of petitioner and his attorney on this issue are very clear. When the Court started to the United State's Attorney if he wished to say anything, the following exchange took place,

"THE COURT: Mr. COOK, is there anything that you have to,--

MR. COOK: Mr. WEST has told me, I would have said something briefly but Mr. WEST has told me that he had a plea bargain with Mr. HUGHES who handled this case at the time of the plea that the Government would not say anything at sentencing. Usually, our usual - I'd like to be sure that I am right, Mr. West, usually, if we get into this position at all we make the agreement that we do not make any recommendations in sentencing but we do not usually agree we will not say anything. Am I correct?

MR. WEST: That's correct, but it is on the record.
(Sentencing Transcript, Page 5)

Petitioner's attorney's reference to the record was to the following exchanges which occurred at the change of plea,

"THE COURT: Mr. West, what is your understanding of the, --any discussions you may have had with the United States Attorney in this case?

MR. WEST: Well the same as indicated by Mr. DeVyver, Your Honor, that Counts II through Count V will be withdrawn and at the time of sentencing the United States Attorney will make no statements regarding sentence.

THE COURT: Is that the limit, Mr. Hughes?

MR. HUGHES: Yes it is, Your Honor, the remaining four counts will be dismissed under Rule 48-A, at the time of sentencing and we will make no statements at the time of sentence. (Change of Plea Transcript, Page 11) (emphasis added)

Mr. Hughes, himself, categorically stated at the time of the change of plea that the Government would make "no statements at the time of sentence". If he had said anything else, petitioner and his attorney would have objected, as we did

ROBERT EDWARD WEST
LAWYER

RUTLAND, VT. 05701

when Mr. Cook started to say something at sentencing.

The personal view of the petitioner, as well as that of his attorney, is unequivocally set forth in the Change of Plea transcript,

"THE COURT: Now have any threats or promises been made to persuade you to enter a plea of guilty in this case?

MR. DeVyver: Just that it's my understanding that the Counts II through Count V would be withdrawn and that the U.S. Attorney would make no statements at the time of sentencing." (Change of Plea Transcript, Pages 9, 10) (emphasis added)

Petitioner and the Assistant United States Attorney both stated unequivocally on the record at the time of the change of plea that the Government had agreed to make "no statements at the time of sentencing"; their statements were identically in agreement. The Assistant United States Attorney attempts to take two words petitioner's attorney spoke at the change of plea out of context of the entire proceedings and use them as a justification for what the United State's Attorney said at sentencing, and also attempts to make some convoluted semantic argument that these remarks were merely some authorized comment on the facts.

Now, if petitioner or his attorney had misrepresented some fact, such as petitioner's name, residence or that he had not purchased the fishing license, we obviously would not have been surprised to find the Government correcting any such factual misstatement. Mr. Cook's remarks were not such factual remarks, however, but the very kind of subjective characterization of the case which the Assistant United State's Attorney unequivocally agreed not to make at the time of the change of plea. Petitioner and his attorney cannot say what the Government usually does or does not do at sentencing. Petitioner and his attorney do know what the Government agreed not to do on this occasion, however. This had been a very lengthy, complicated case, with various stages taking place over extended periods of time. It was in this context that, as the Assistant United State's Attorney himself stated, that he would make "no statements at the time of sentence."

ROBERT EDWARD WEST

LAWYER

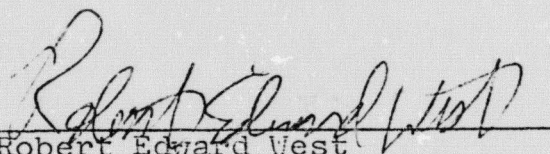
~~50 MERCHANTS ROW~~

RUTLAND, VT. 05701

Even if the Assistant United State's Attorney had not made this unequivocal statement, petitioner feels that no reasonable person could view the United State's Attorney's remarks other than statements regarding sentence and not a simple statement of fact. But the Assistant United State's Attorney's statement was unequivocal, and while the Government may now regret not "letting the left hand know what the right hand is doing", "it does not excuse them." Santobello v. New York, 404 US 257, 262, 260.

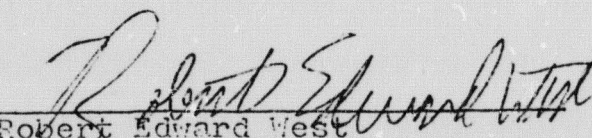
Reading the entire transcripts of both the change of plea and the sentencing in light of the Affidavit of Petitioner's Attorney, Robert Edward West, which is set forth below, it is clear that the Government did violate the terms of the plea agreement and that the Petitioner's Motion to Vacate and Set Aside Conviction and Judgment should be granted.

DATED AT Rutland, Vermont this 26th day of August, 1977.

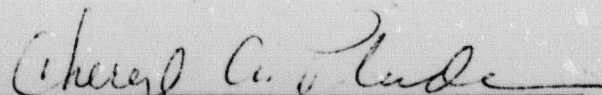

Robert Edward West
Attorney for Calvin R. DeVyer

AFFIDAVIT

Robert Edward West, Attorney for Calvin R. DeVyer, first being duly sworn, deposes and says that he represents the Petitioner in the above entitled matter, and that the contents thereof are true and correct to the best of his knowledge and belief.


Robert Edward West

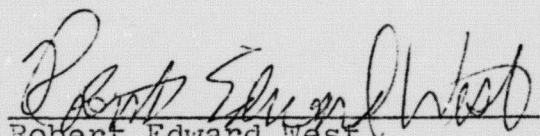
Sworn and subscribed to before me this 26th day of August, 1977



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CERTIFICATE OF SERVICE

I, Robert Edward West, attorney for Calvin R. DeVyver, do hereby certify that I served the foregoing Motion to Vacate and Set Aside Conviction and Judgment on the Respondent by mailing a copy of the same to its attorney of record, John R. Hughes, Jr., Assistant United State's Attorney, Rutland, Vermont 05701, this *21st* day of *August*, 1977.


Robert Edward West
Attorney for Calvin R. DeVyver

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

44

United States of America)
)
 v.) Criminal Action
)
 Calvin Ronald DeVyver) File No. 6850

ORDER

The petitioner in this case pleaded guilty to one count of a five count indictment on March 15, 1976. On May 7, 1976, the petitioner was sentenced and the other four counts of the indictment dismissed. The petitioner has now moved to vacate the sentence on the ground that the United States Government failed to keep its bargain with the petitioner that the prosecutor would make no "remarks at sentencing." Neither the petitioner nor his attorney raised any objections at the time of sentencing. The transcript of the hearing on the change of plea indicates only that the plea agreement was that the United States Attorney would make no statements regarding sentence. The remarks of the United States Attorney, objected to by the petitioner, were in no way related to the sentence imposed by the court. The record at sentencing discloses that after defense counsel had made a plea for leniency, the court inquired if the United States Attorney had anything to say. He responded:

The only thing I wish to say, the Government does consider this a serious matter and it is a part of a serious episode. We have no recommendation, your Honor, but we did consider this a serious case, much more serious than Mr. West has represented.

The petitioner contends that the plea agreement included a promise by the Assistant United States Attorney that the Government would make no remarks at the time of sentencing.

Filed September 6, 1977
Lee R. LaVigne
Deputy Clerk

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The Assistant United States Attorney, in charge of the case, has submitted an affidavit stating that the plea agreement involved an exchange of the petitioner's guilty plea to Count I of the indictment for an agreement by the Government to dismiss Counts II-V at the time of sentencing and to make no remarks or recommendations to the court concerning the sentence to be imposed. The affidavit is supported by the following excerpt from the transcript of the hearing of the change of plea:

The Court: Mr. West, what is your understanding of the, -- any discussions you may have had with the United States Attorney in this case?

Mr. West: Well the same is indicated by Mr. DeVyver, your Honor, that counts II-V will be withdrawn and at the time of sentencing the United States Attorney will make no statements regarding sentence. (Emphasis added.)

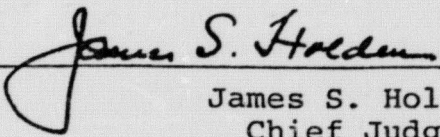
The Court: Is that the limit Mr. Hughes?

Mr. Hughes: Yes it is, your Honor, the remaining four counts will be dismissed under Rule 48A, at the time of sentencing we will make no statements at the time of sentence.

The petition is a frivolous attempt to semanticize the use of the word "statement" to erase the consequences of a valid plea. If it can be said that the letter of the bargain was exceeded, the spirit was preserved. Moreover, the remark by the United States Attorney was, at most, a response to defense counsel's palliation of the offense charged and there was no such breach here. It had no bearing on the sentence imposed. Probation was indicated by force of the fact that the defendant had already served an extended period of confinement on the sentence originally imposed by Judge Coffrin. ^{1/}

Accordingly, it is ORDERED: That the petitioner's motion to vacate and set aside the conviction and judgment is denied.

Dated at Rutland, in the District of Vermont, this 6th
day of September, 1977. 46


James S. Holden

Chief Judge

1/ The petitioner was originally sentenced to confinement by Judge Coffrin. That sentence and plea was vacated by Judge Coffrin on motion by defendant after the sentence had been served and the defendant released on parole. The plea of guilty to the same charge was accepted by this court. By the present motion DeVyver seeks to vacate his second plea of guilty.

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CALVIN RONALD DeVYVER,

Petitioner,

VS.

UNITED STATES OF AMERICA,

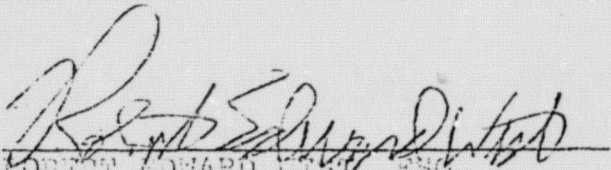
Respondent.

Civil No. 75-181

NOTICE OF APPEAL

Notice is hereby given that Calvin Ronald DeVyver, Petitioner abovenamed, hereby appeals to the United States Court of Appeals for the Second Circuit from the order denying his motion to vacate and set aside conviction and judgment pursuant to 28 U.S.C. Section 2255 entered in this action on the 6th day of September, 1977.

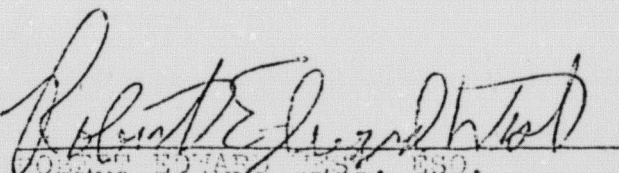
Dated at Rutland, Vermont, this 16th day of September, 1977.


ROBERT EDWARD WEST, ESQ.
Attorney for Calvin Ronald DeVyver

26 Williams Street
Rutland, Vermont 05701

CERTIFICATE OF SERVICE

I, Robert Edward West, attorney for Calvin Ronald DeVyver, do hereby certify that I served the foregoing NOTICE OF APPEAL upon the respondent by mailing a copy of same to its attorney of record, John R. Hughes, Jr., Assistant United States Attorney, Rutland, Vermont 05701, this 16th day of September, 1977.


ROBERT EDWARD WEST, ESQ.
Attorney for Calvin Ronald DeVyver